

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





77-6137

In The

United States Court of Appeals

For the Second Circuit

BENEFICIAL FINANCE CO. OF NEW YORK, INC.  
*Plaintiff-Appellant,*

*v.*

RONALD DALLAS AND MARY E. DALLAS,  
*Defendants,*

*and*

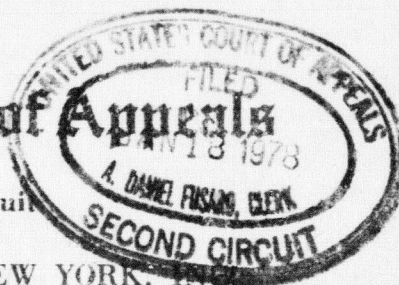
UNITED STATES POSTAL SERVICE,  
*Defendant-Appellee.*

On Appeal From The United States District Court For The  
Western District Of New York

BRIEF FOR APPELLEE

RICHARD J. ARCARA,  
United States Attorney for the  
Western District of New York  
*Attorney for Appellee*  
233 U. S. Courthouse  
Rochester, New York 14614

GERALD J. HOULIHAN  
Assistant United States Attorney  
*Of Counsel*







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On Appeal From The United States District Court For The  
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**BRIEF FOR APPELLEE**

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**Issues Presented\***

The United States Postal Service (U.S.P.S.) seeks a decision affirming the District Court and contrary to similar decisions in the Seventh, Eighth, Third and Fourth Circuits. Contrary to Appellant's contentions, the issues presented are as follows:

1. Whether Congress, in enacting the Postal Reorganization Act of 1970 (PRA), intended to waive for the U.S.P.S. the

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\*This case has never been considered by this Court.

protection of sovereign immunity it enjoyed as the Post Office Department, the statutory predecessor of the U.S.P.S. (39 U.S.C. Sec. 201, note).

The Government submits that a realistic and fair reading of the legislative history of the Postal Reorganization Act establishes that Congress never intended to waive sovereign immunity for the U.S.P.S. Furthermore, this is the same immunity from commercial garnishment that Congress affords to all similar federal agencies.

2. Whether the doctrine of collateral estoppel is applicable to issues of law only and, if never raised below, can be raised for the first time on appeal.

The Government submits that the collateral estoppel doctrine is not applicable to issues of law only and may not be raised for the first time on appeal.

#### Counterstatement of Facts

There is no dispute between the parties regarding the facts which form the basis for this appeal. The facts were stipulated to the District Court.

The only issues to be determined are matters of law. No party has ever claimed that any issue of fact was in dispute.

#### Statement of Case

On July 26, 1977 the United States District Court, Western District of New York, held that the U.S.P.S. is immune from commercial garnishment proceedings against its employees. Notice of Appeal was filed on August 25, 1977.

The original income execution served upon the U.S.P.S. was removed to Federal Court by stipulation pursuant to Title 39, United States Code, Section 409(a). After removal, the parties



stipulated all factual issues in anticipation of cross-motions for summary judgment. On July 26, 1977 the District Court held that the U.S.P.S. was entitled to summary judgment in its favor and denied the motion for summary judgment made by Beneficial Finance Co. of New York, Inc.

### POINT I

The decisions of other circuits are contrary to the position urged by the U.S.P.S.

The government acknowledges that there are decisions in the Seventh, Eighth, Third and Fourth Circuits that are contrary to the position taken by the U.S.P.S. in this case.<sup>1</sup>

However, the U.S.P.S. submits that those decisions failed to properly consider the legislative history of the Postal Reorganization Act (PRA); misapplied the Supreme Court decision in *FHA v. Burr*, 309 U.S. 242 (1940); and wrongfully rejected traditional principles of sovereign immunity which have continued vitality in the Supreme Court. *U.S. v. Testan*, 424 U.S. 392 (1976).

The fundamental question is whether the U.S.P.S., the statutory successor of the former Post Office Department, retains the former department's unquestioned general sovereign immunity from State power, including State power to create wage garnishment causes of action.

In examining this question the Federal Circuit Courts have failed to examine pertinent details of the legislative history in order to determine the Congressional intent in providing the

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<sup>1</sup>*Standard Oil Division, Am. Oil Co. v. Starks and U.S.P.S.*, 526 F.2d 201 (7th Cir. 1975); *May Department Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Goodman's Furniture Co. v. U.S.P.S.*, 561 F.2d 462 (3rd Cir. 1977); *General Electric Credit Corp. v. Smith*, \_\_\_\_ F.2d \_\_\_\_ (4th Cir. November 23, 1977).



"sue and be sued" clause in the PRA. Instead, four words of the clause are taken at face value and construed liberally in accord with decisions that are fundamentally distinguishable from the situation of the U.S.P.S. As the Supreme Court said in another case in which a "sue and be sued clause" was construed:

"Unquestionably the provision disconnected from its context would sustain the conclusion that there exists a general liability to be sued without reference to consent. Indeed, the words to sue and be sued are but a crystallized form of expression resorted to for the purpose of aptly stating the right to sue and the liability to be sued, which springs from a grant of corporate existence, private or public. But this does not solve the question here arising, which is the meaning of the words in the act under consideration, for it may be that like words may have one significance in context and a different signification in another." *Porto Rico v. Rosaly*, 227 U.S. at 275.

The Seventh Circuit, when considering its decision in *Standard Oil v. Starks*, 528 F.2d 201 (7th Cir. 1975), was not provided a detailed examination of the legislative history of the PRA. Once decided, the Seventh Circuit opinion became the template for subsequent Circuit decisions all of which fail to address and dispose of the Government's position urged in this appeal. While relitigation of this issue has been the subject of criticism in other Circuits,<sup>2</sup> the government submits that these decisions have provided the basis for the well-considered position now presented on this appeal. This position is advanced to this Court seeking an independent evaluation of the issue. This, of course, is consistent with this Court's expressed attitude on relitigated matters:

"Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an

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<sup>2</sup>*May Department Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Goodman's Furniture Co. v. U.S.P.S.*, 561 F.2d 462 (3rd Cir. 1977).

independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, where our minds are not persuaded by the agreements advanced." *Haberle Crystal Springs Brewing Co. v. Clarke*, 30 F 2d 219 (2d Cir. 1929 Judges Manton, Learned, Hand and Swan), rev'd on other grounds, 280, 384 (1930).

In order to properly present the affirmative position of the U.S.P.S., it is necessary to face directly the obvious weight of authority in other circuits. The decisions of the Eighth, Third and Fourth Circuits rely specifically on the analysis of the issue decided in the Seventh Circuit. The Seventh Circuit's reasoning, the U.S.P.S. respectfully submits, suffers from three major flaws:

1. *The Court misapplied the test the Supreme Court spelled out in the leading cases of Keifer & Keifer v. RFC*, 306 U.S. 381 (1939), *FHA v. Burr*, 309 U.S. 242 (1940); and *RFC v. Menihan*, 312 U.S. 81 (1941).

In *Burr*, the Court recognized that when Congress created corporations to handle functions traditionally carried out by private industry, and gave those agencies the authority "to sue and be sued", it created a presumption of amenability to all kinds of judicial processes. The Court reasoned that this occurred once the government corporation was "launched into the commercial world". The Seventh Circuit incorrectly applied this holding to the U.S.P.S. situation. Instead, *Burr* is clearly distinguishable because (a) the RFC was a government corporation and the FHA was considered to be a government corporation, whereas the U.S.P.S. is not a government corporation and legislative proposals to make it such were explicitly rejected 306 U.S. at 390-391; 309 U.S. 242, 245 and n.10 at 245; (b) the RFC and FHA were newly established agencies created to perform functions which had formerly been performed by private enterprise, whereas the U.S.P.S. is the statutory successor to the Post Office Department and the



General Post Office before it which for two centuries — the whole history of the Republic — had operated the nation's postal system as a sovereign federal instrumentality immune from state power, regulation, or control; (c) the funds of the U.S.P.S. continue to be appropriated funds held within the Treasury 39 U.S.C. §§2003, 2401, whereas the funds of the FHA (which the Supreme Court held were subject to execution of a State garnishment order) had been disbursed from the Treasury; (d) there was apparently no legislative history to inform the Supreme Court of the legislative intent of the FHA and RFC "sue and be sued" clauses, whereas the legislative history of the PRA is extensive; (e) there are word differences between the various "sue and be sued" clauses. In addition, the application of the statutory construction of the "sue and be sued" clause in *Burr* to that of the U.S.P.S. fails to recognize the extensive legislative history of the PRA to the contrary. This issue is discussed in detail in Point III of this brief.

## 2. *The Seventh Circuit misconstrued the Postal Reorganization Act of 1970 (PRA).*

The Seventh Circuit held that the PRA was the significant turning point for the case. However, the government respectfully submits that the Court misinterpreted the stated Congressional purpose of "reorganization" as a "transformation into the business world." Instead, the old Post Office Department was converted from an "executive department of the government" to "an independent establishment of the executive branch of the Government" (39 U.S.C. 201). Significantly, the activities of the U.S.P.S. remained substantially the same as those of the Post Office Department. The PRA did not create a government corporation like the FHA (part of the rationale of *Burr*); rather, Congress explicitly rejected such a form of organization (H.R. Rep. No. 91-1104, 91st Cong. 2nd Sess. 6 (1970) and the mail delivery function of Government remained in the executive branch.



The chief purpose of the PRA was to "reorganize" the existing Post Office Department in a way which would revitalize the decaying institution. Further, the Act itself contains provisions which support a finding that the U.S.P.S. was meant to enjoy general immunity from state power; see, e.g. 39 U.S.C. 409(c) (permitting suits brought under Federal Tort Claims Act) and Point III B of this Brief. Perhaps most persuasive is the fact that the 1975 Social Security Act, Title 42 U.S.C. Section 659, (which authorized garnishment of wages of employees of the United States for purposes of alimony and child support only) is fully applicable to U.S.P.S. as evidenced by the legislative history. See, Senate Finance Committee Print, "Child Support Data and Materials," 1975, 94th Cong. 1st sess. 139 (1975). This fact would tend to show the traditional exemption from garnishment existed prior to this enactment. More importantly, 1977 amendment to this section explicitly makes only this section apply to the U.S.P.S. Sec. 462(a), Social Security Act, as amended, Pub. L. No. 95-30, Sec. 501 (d), May 23, 1977, 91 Stat. 159. Since Congress must have been aware of the *Starks* and *May* cases prior to this amendment, it would not have enacted this legislation had it considered those decisions correct. Cf. *Standard Oil Div. Am. Oil Co. v. Starks*, 528 F2d at 203 (7th Cir. 1975).

**3. *The 7th Circuit rejected traditional principles of sovereign immunity which have continued vitality in the United States Supreme Court.***

While sovereign immunity has lately come under attack from some legal commentators, there can be no doubt of its continued vitality in the courts. Indeed, the Supreme Court, in *U.S. v. Testan*, 424 U.S. 392, 399 (1976) recently affirmed this ancient legal principle: "It has long been established . . . that the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."

While the *Standard Oil* case has been followed by the other Circuit Courts to consider the issue, a substantial number of District Courts have found contrary to *Standard Oil* and have maintained the U.S.P.S.'s freedom from garnishment. These Courts have, in our view, correctly distinguished the issue from that presented in *Burr* and correctly perceived Congressional intent in the PRA: *Beneficial Finance Co. v. Moulard*, and related cases Civil No.'s 77-369; 77-471; 77-474; 77-486; 77-506 (MD La. January 5, 1978); *Pacific Lighting v. U.S.P.S. and James*, Civil #CV77-1323-DWW (C.O. Cal, November 9, 1977); *Montgomery Ward & Co. v. U.S.P.S.*, Civil #C-77-1221-CFP (N.D. Cal. July 29, 1977); *Early v. Potter*, Civil #C-3-77-236 (S.D. Ohio August 8, 1977); *MCD Enterprises v. Bouknight*, Civil #76-2064 (D.D.C. December 7, 1976); *McLachlen Nat. Bank v. Johnson*, Civil #76-2065 (D.D.C. November 30, 1976); *Nolan v. Woodruff*, 68 F.R.D. 660 (D.D.C. 1975); *Drs. Macht, Podore & Associates, Inc. v. Girton*, 392 F.Supp. 67 (S.D. Ohio 1975); *Detroit Window Cleaners Local 139 Ins. Fund v. Griffin*, 345 F. Supp. 1343 (E.D. Mich. 1972); *Lawhorn v. Lawhorn*, 351 F. Supp. 1399 (S.D.W. VA. 1972); *Kann Corp. v. Lucas*, Civil Action No. 76-1305 (D.O.C. July 28, 1976); *Bean, Phelps & Bean v. Moore*, Civil Action No. 6305 (E.D. Tenn. 1972); *Midtown Finance Co. v. Russell*, Civil Action No. 6307 (E.D. Tenn. April 24, 1972); *Kann v. Monroe*, 425 F. Supp. 169 (D.D.C. 1977); *Nalco Credit Union v. Turner*, Civil Action No. 76-323(c)(3) (E.D. Mo. 1976); *Joseph Chevrolid Inc. v. Culberson*, No. C-1-76-145 (S.D. Ohio 1976); *Laclede Gas Co. v. Fayne*, No. 76-424(c)(4) (E.D. Mo. 1976); *Franklen Union Furniture Co. v. Batchman*, No. 76-599 C(3) (E.D. Mo. July 19, 1976); *Roy T. Radcliffe v. Blunk*, No. 76-512 (C)(A) (E.D. Mo. July 7, 1976).

In addition, the 9th Circuit, in *Dennis v. Blount*, 497 F.2d 1305, 1307 (9th Cir. 1974) in *dicta* stated that the wages of Postal employees are not subject to garnishment. Although Dennis was employed by the Post Office Department, the Court



did not distinguish between it and the U.S.P.S. despite the fact this was 3 years after the PRA.

While Appellant contends, on the authority of the "sue and be sued" clause of the 39 U.S.C. 401(1) (1970), as construed in *Standard Oil v. Starks*, 528 F.2d 201 (7th Cir.1975), and its progeny, that sovereign immunity has been waived, the U.S.P.S. contends, on the authority of numerous decisions, that its general sovereign immunity has not been waived.

Since it is unquestioned that Congress has power to decide whether to waive the Constitutional immunity of a Federal instrumentality, the question is one of statutory construction; namely, whether the PRA may be construed to constitute such a waiver of sovereign immunity.

## POINT II

"Sue and be sued" clauses in Federal statutes do not necessarily constitute waivers of the Federal sovereign immunity of the Federal instrumentality authorized to be sued. The extent, if any, to which immunity is waived depends upon congressional intent as demonstrated by the entirety of the statute in which the "sue and be sued" clause is contained.

A "sue and be sued" clause is not necessarily a waiver of sovereign immunity. It literally grants a power, thereby conferring the capacity to sue and be sued. By itself, nothing is literally waived, since sovereign immunity is not mentioned and no cause of action is expressly created.

If sovereign immunity is to be waived by the enactment of a "sue and be sued" clause, such waiver must result from consideration of the clause in the overall context of the statute in which it is included. Whether a "sue and be sued" clause should be construed as waiving sovereign immunity depends upon a proper interpretation of the whole statute in which it appears



rather than from a mechanical, superficial reading of the words themselves. Consideration should be given to the whole statutory plan, the kind of governmental entity the statute creates, the prior history of the functions the entity is created to perform, and the purposes of the entity's enabling legislation.

An examination of the following discussion shows that a "sue and be sued" clause in any statute is subject to a wide range of interpretations. In *Porto Rico v. Rosaly*, 227 U.S. 270 (1913), the Court construed a "sue and be sued" clause in a territorial government's enabling act as merely authorizing suit against the territorial government to the extent the territorial legislature consented to suit. Thus, the "sue and be sued" clause did not, by itself, authorize or create a single cause of action. In so construing this "sue and be sued" clause, the Court considered the prior history of acts incorporating other territories, and the legislative purpose of the remainder of the enabling act of the territorial government. In this regard, the Supreme Court said:

"... [T]here is, if not a complete identity . . . a strong likeness to the powers usually given to organized Territories and moreover a striking similarity to the organic Act of the Hawaiian Islands . . . . But as the incorporated Territories have always been held to possess an immunity from suit and as it has been moreover settled that the government created for Hawaii is of such character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico." 227 U.S. at 273-274.

Furthermore, in speaking of the clause itself, the Court stated:

"Unquestionably the provision disconnected from its context would sustain the conclusion that there exists a general liability to be sued without reference to consent. Indeed, the words to sue and be sued are but a crystallized form of expression resorted to for the purpose of aptly stating the right to sue and the liability to be sued, which springs from the grant of corporate existence,

private or public. But this does not solve the question here arising, which is the meaning of the words in the act under consideration, for it may be that like words may have one significance in one context and a different signification in another." *Id.* at 275.

In a second instance, a "sue and be sued" clause of the District of Columbia was construed not to consent to wage garnishment suits. *Chewing v. District of Columbia*, 119 F.2d 459 (Ct. App. D.C.), *cert. denied*, 314 U.S. 639, *reh. denied*, 314 U.S. 701 (1941). In reaching this conclusion, the Court of Appeals relied on three factors: (1) the "prevailing rule" generally exempting municipal corporations from garnishment "on the theory that they should not be subjected, at the expense of taxpayers, to litigation in which they have no interest . . .", 119 F.2d at 460; (2) the prior history of immunity of the District of Columbia government from garnishment suits, 119 F.2d at 460; and, (3) the fact that the District of Columbia as a municipal corporation, performing the functions normally performed by state and municipal governments, "is not a 'modern federal corporation \* \* \* launched \* \* \* into the commercial world.'" 119 F.2d at 461.

It is in the context of such overall congressional intent that consideration must be given to the "sue and be sued" clauses construed in the three Supreme Court cases on which *Standard Oil* and its progeny purport to rely. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 (1939); *F.H.A. v. Burr*, 309 U.S. 242 (1940) and, *R.F.C. v. Menihan*, 312 U.S. 81 (1941). These cases involved either a government corporation (or what was considered by the Court to be a government corporation) and each was newly established in the New Deal period to perform functions such as mortgage lending which historically had theretofore been performed by private corporations. Since such private enterprises had theretofore been subject to causes of action created by State law, it followed that, in the absence of a contrary showing, "it must be



presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued', that agency is not less amenable to judicial process than a private enterprise under the circumstances would be." 309 U.S. at 245.

In the *Burr* case, the Court's opinion makes it very clear — by substantial repetition — that the Court's discussion referred *not to all Federal instrumentalities having authority to "sue and be sued,"* but only to the then contemporaneous New Deal government corporations having "sue and be sued" clauses in their enabling acts and authorized to conduct financial and business transactions theretofore conducted only by private businesses.

A sequel to the *Burr* case that is relevant is that, since the 1965 reorganization of the FHA into the Department of Housing and Urban Development, 42 U.S.C. 3534(a)(1970), the FHA has successfully taken the position that the wages of its employees are no longer subject to wage garnishment. Although the "sue and be sued" clause construed in the *Burr* case continues in effect, the responsibility is now vested in the Secretary of Housing and Urban Development, (12 U.S.C. 1702 (1970) (last sentence)), who is the head of an executive department, (5 U.S.C. 101 (1970)) and thus immunity is recognized. There are two unpublished memorandum decisions in which this change in the FHA's position has been upheld: *Vlahos v. Bertrang*, Civ. No. 652-66, (D.D.C., October 23, 1970) and *Rodriguez Portela & Co. v. Kings Hill Corp.*, Civ. No. 201-73, (D. Puerto Rico, May 31, 1973). A search for relevant cases would disclose that for eleven years there has been no successful wage garnishment of FHA employees, notwithstanding that the same "sue and be sued" clause construed by the Supreme Court in *Burr* continues in effect. Such a circumstance persuasively suggests that something more than a mere "sue and be sued"



clause is necessary before there can lawfully be wage garnishment of a Federal instrumentality under the authority of State laws.

The six "sue and be sued" clause situations that have been discussed (the *Rosaly* and *Chewing* cases, the *Keifer-Burr Menihan* trilogy, and the post-1965 FHA cases) show that a "sue and be sued" clause in a Federal enabling statute may be construed, at one extreme, as entirely waiving sovereign immunity (as in *Burr*), or, at the other extreme, as not waiving sovereign immunity at all (as in *Rosaly* or with the *FHA* after 1965). The precedents purport and appear to be consistent with each other (for example, *Rosaly* is cited with approval in *Burr*, 309 U.S. at 245 n. 3; *Chewing* distinguishes *Burr*. 119 F.2d at 461). However, none of the cases is precisely on point here. The U.S.P.S. is neither a State or territorial government, nor a municipal corporation, nor a Federal executive department, nor a Federal government, nor an entity established to perform functions previously performed by private enterprise.

Furthermore, the precedents do not create a presumption that "sue or be sued" clauses should be liberally construed whenever they appear, particularly when the instrumentality is not a government corporation and is not created to perform functions theretofore performed by private enterprise. It is respectfully submitted that, particularly in this respect, the *Standard Oil*<sup>3</sup>, *May Department Stores*, *Goodman's Furniture*, and *General Electric* cases, *supra*, are incorrect as a matter of law. Contrary to the view that all "sue and be sued" clauses must be broadly construed, the relevant precedents establish the obligation to

<sup>3</sup>It appears that the Seventh Circuit was aware of only two cases decided in the Government's favor. 528 F.2d at 202. Apparently, it was not aware of the other five cases, including Judge Richey's decision in the District of Columbia, previously decided favorably to the Government. Nor did the Court discuss certain pertinent elements of the statute and legislative history discussed herein.

analyze carefully the whole structure of a Federal entity authorized to "sue and be sued," *before* determining the meaning of the clause and deciding whether the sovereign immunity was intended to be waived in any respect. Furthermore, the Second Circuit has said that statutes waiving sovereign immunity are to be strictly construed. *Brown v. G.S.A.* 507 F.2d 1300, 1307 (2d Cir. 1974).

### POINT III

The Postal Reorganization Act was not intended to waive the sovereign immunity of the Federal Postal System.

A. *Prior to postal reorganization in 1971, the Federal Postal System was endowed with the sovereign immunity of the United States.*

Unlike the newly created New Deal government corporations, the postal system is one of the oldest agencies of the national government.<sup>4</sup> The general sovereign immunity of the Federal postal system from various forms of State regulation and control had long been recognized prior to the enactment of the PRA, e.g. XXXIV J.C.C. 239 (1788) (Congressional power over post offices was "exclusive;" State authorities did not have, and should not have been delegated by Congress, power to stop or open letters in United States post offices); *Johnson v. Maryland*, 254 U.S. 51 (1920); *United States v. Maxwell*, 137 F. Supp. 298, 301-302 (W.D. Mo. 1955); *aff'd*, 235 F.2d 930 (8th Cir.), *cert. denied*, 352 U.S. 943 (1956) (Federal power to protect the mails was "exclusive" and "supreme"). Immediately prior to postal reorganization, the Post Office Department was an executive department having unquestionable immunity from wage garnishment, like that of the Department of Housing and Urban Development. 5 U.S.C.

<sup>4</sup>The national postal system was created by the Continental Congress nearly one year before the Declaration of Independence. 11 J.C.C. 208 (1775).



101 (1964); 39 U.S.C. 301 (1964); 5 U.S.C. 101 (1970). Federal sovereign immunity has continued to be recognized by the Courts since the PRA became effective in 1971. *American Post. Wkrs. Un., Detroit v. Independent Post. Serv.*, 349 F. Supp. 1297, 1299 (E.D. Mich. 1972) *aff'd*, 481 F.2d 90 (6th Cir. 1973); *Grover City v. U.S.P.S.*, 391 F. Supp. 983, 986-987 (C.D. Cal. 1975) (any municipal ordinance regulating placement of mail boxes contrary to valid Federal postal regulations would be preempted under Supremacy Clause of the Constitution).

**B. *The 1968 proposal to reorganize the postal system as a Government corporation was modified so as not to create such a corporation, in part with the intent of preserving the postal system's historic immunity from State power.***

In 1968 the Presidential Commission on postal reorganization ("Kappel Commission") recommended the reorganization of the Post Office Department as a government corporation.<sup>5</sup> Although many of the Commission's recommendations were later enacted, its specific recommendation to reorganize the postal system as a government corporation was carefully considered, and explicitly rejected. One of the grounds for opposition to the Kappel Commission "Corporation" proposal was the harm that might ensue to the U.S.P.S. from non-uniform regulation that the corporate world is usually subject to and which results from its lack of sovereign immunity. Frederick C. Belen warned of this on May 20, 1969 in the House Hearings as follows:

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<sup>5</sup>"We recommend that a Postal Corporation owned entirely by the Federal Government be chartered by Congress to operate the postal service of the United States on a self-supporting basis." President's Commission on Postal Organization, "Towards Postal Excellence," Washington, D.C. Government Printing Office, June 1968, page 2.



[T]he issue is not whether an academic case can be made for having the Postal System a quasi-private corporation and thus shed many difficult problem areas it faces. . . . In thousands of ways, it routinely performs functions which are those of the sovereign. It has a vast role in tax collection, census activities, Government disbursements, and mail to troops. . . . Change of name or skeletal form will not result in the change or disappearance of the problems which result primarily from growth rates. The Postal System will take its problems with it regardless of where it goes, what it is called, or who heads it. It is said that Postal System should be divorced from the main executive Government body to free itself from interference. One must consider the fact that our form of commercial structure and regulatory laws subject our private corporations to equally restraining factors, which grow more complex with corporate size. There are Federal, State, county, and municipal laws which are not uniform but apply to (1) employees' rights, (2) working conditions, (3) unemployment compensation, (4) building and vehicular standards, (5) eminent domain authority, (6) use of private property, for example, mail deposit boxes and slots, (7) employment practices and tenure, (8) securities and stockholder problems, *and scores of other activities.* (emphasis added) The more the Postal System might be removed from the public sector in which it operates, the more it would be subject to varieties of non-uniform laws." 1969 House Hearings I, 116 (May 20, 1969) (statement of Frederick C. Belen, former Deputy Postmaster General, former Assistant Postmaster General, former Chief Counsel, Post Office and Civil Service Committee, U.S. House of Representatives.)

The Administration's postal reform bill was transmitted to the Congress one week after Mr. Belen issued his public warning against the dangers inherent in a waiver of the sovereign immunity of the Postal System. Message from the President of the United States relative to reform of the nation's postal system, H.R. Doc. No. 91-121, 91st Cong., 1st Sess. 1 (May 27, 1969).

The 1969 Administration postal reform bill proposed to establish the Postal Service, not as a government corporation, but "as a body corporate and an instrumentality of the United States . . .",<sup>6</sup> with power to sue and be sued "in its corporate name".<sup>7</sup> Testimony on this bill was explicit that the proposed hybrid "corporation-instrumentality" would — by continuing as an instrumentality of the United States Government — retain the postal establishment's immunity from State and local taxation:

Mr. DULSKI [Chairman, House Post Office Committee]. While we are on the matter of property to be owned by the Corporation, would the postal Corporation be exempt from local property and other taxes on properties it owns in the same manner as the Federal Government?

Mr. BLOUNT [Postmaster General]. Yes, sir.

Mr. DULSKI. It would?

Mr. BLOUNT. Yes, sir; as an instrumentality of the Federal Government, I believe that its property would

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<sup>6</sup>Proposed 39 U.S.C. 202 of HR 11750, 91st Cong., 1st Sess. (1969), the Administration's first postal reform proposal, stated in a pertinent part: "The 'United States Postal Service' is established as a body corporate and an instrumentality of the United States for the purpose of owning and operating the postal system of the United States." Reprinted in: "Postal Service Act of 1969, H.R. 11750, Recommendations of the President of the United States", Committee Print No. 8, for the use of H.R. Comm. on Post Office and Civil Service, 91st. Cong., 1st Sess. 17 (U.S. Gov't Printing Office 1969); also reprinted in: "Postal Modernization," Hearings before S. Comm. on Post Office and Civil Service, on reorganization of the postal establishment to provide for efficient and economical postal service, 91st Cong., 1st Sess. 97 (1969).

<sup>7</sup>The "corporation-instrumentality" bill contained a "sue and be sued" clause, as follows: "The Postal Service shall have the following general powers: . . . (2) to sue and be sued in its corporate name . . ." Proposed 39 U.S.C. 205(2), H.R. 11750, *supra* at 21, and also in "Postal Modernization", *supra*, at 101.



unquestionably be exempt from taxation by State and local governments.<sup>8</sup>

This statement strongly supports the view that such a hybrid "corporation-instrumentality" was intended — also as a Federal instrumentality — to retain its immunity from other exercises of State power, including state wage garnishments process.

In 1970, the postal reform bill was revised to remove any mention of a "body corporate" empowered to sue and be sued "in its corporate name." Instead, the Administration proposed, and Congress agreed, to reorganize the postal system as an "independent establishment in [or of] the executive branch of the government of the United States" empowered to sue and be sued "in its official name". H.R. 17070, 91st Cong., as reported, proposed 39 U.S.C. 102, 111(1), at 116 Cong. Rec. 20209, 20210 (1970); S. 3842, 91st Cong., as reported, proposed 39 U.S.C. 301, 501(1), at 116 Cong. Rec. 21510, 21511 (1970).

The decision of the Administration and Congress in 1970 to drop the corporate form entirely could not have been more clearly expressed. The "corporation-instrumentality" clause was replaced by the "independent establishment" clause now found in 39 U.S.C. 201, and the "sue and be sued" clause was revised to replace the words, "in its corporate name", with the words, "in its official name", now found in 39 U.S.C. 401(1). The disavowal of the corporation proposal is precisely recorded in the legislative history:

The bill, however, makes important improvements to, and refinements of, the Kappel Commission recommendations. *It does not provide for a Government corporation*, but it does provide for matching respon-

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<sup>8</sup>"Post Office Reorganization," Hearings before H. Comm. on Post Office and Civil Service on various proposals to reform the postal establishment, 91st Cong. 1st Sess., part I, 336 (U.S. Government Printing Office, 1969).



sibility with authority to conduct the affairs of the Postal Establishment on a business like basis, *while retaining the public service character of the Nation's mail system.*" H.R. Rep. No. 91-1104, 91st Cong. 2d Sess. 6 (1970) (emphasis added).

The legislative intent to retain the Postal Service's character as a Federal instrumentality is clearly demonstrated in various provisions of the Postal Reorganization Act. Two general provisions directly reject the original corporation proposal, 39 U.S.C., 101(a) and 201. Other provisions authorize the performance of functions that no private corporation is ever authorized by law to perform, *e.g.*, treaty-making; the power of eminent domain; the assessment of fines. 39 U.S.C. 401(9), 407, 5206, 5403, 5604. Still other provisions necessarily presuppose the continuation of Federal governmental immunity from causes of action created by State law. There is a provision continuing in effect: the *Federal Tort Claims Act*, 39 U.S.C. 409(c); there is a provision continuing the *Miller Act*, 39 U.S.C. 410(b)(4)(B); and there is a provision allowing certain attachments of transportation contractor wages, 39 U.S.C. 5006. Obviously, there would be no reason for Congress to subject the Postal Service and its contractors to either the *Miller Act* or to such contract payment attachments, if general sovereign immunity from State power had not been continued. Had the immunity been generally waived, State laws on attachments and laborer's and materialmen's liens would have been available to deal with such matters.

Further evidence that the Postal Service was intended to enjoy general immunity from State power is provided by the provision of the Postal Reorganization Act which specifically consents to State estate, inheritance, or gift taxes on the principal of, or interest on, bonds issued by the Postal Service in its own name and not guaranteed by the United States. 39 U.S.C. 2005(d)(4).

Still further evidence that the general immunity of the postal system from State power was intended to continue is furnished by the record of Congressional consideration of a provision (ultimately rejected) that would have included in the postal rate base, "an imputed charge for Federal, state, local taxes which [the Postal Service] would have to pay if it were privately owned . . ." Proposed 39 U.S.C. 1203, in H.R. 11750, 91st Cong., 1st Sess. (1969) in "Postal Modernization," *supra* at 166 (1969). It would not have been necessary to consider whether to "impute" such charges if sovereign immunity had been intended to be waived. Thus, the States would have had power to bring causes of action to collect such taxes, and such taxes would have been actual rather than "imputed" charges.

The hearings on the proposal to "impute" taxes in setting parcel post rates were extensive. *Id.* at 685-734 (Senate hearings); "Post Office Reorganization", Hearings before the H. Comm. on Post Office and Civil Service, 91st Cong., 1st Sess., on various proposals to reform the postal establishment, Serial No. 91-4, II, 547-572 (1969). The entire debate in the hearings on this proposal was conducted on the assumption that under any plan to reorganize the postal system, the sovereign immunity of the Federal postal system from State taxation would continue, the only question being whether it would be "fair" for federal rate-making purposes to "impute" as part of the postal rate base the State and local taxes that would not in any event be paid. At one point, the assumption is explicitly stated:

Mr. HOGAN. But is you are having the Post Office Department include a fee in their rate which takes advantage of taxes which the Post Office does not pay, it would seem logical to also include costs for advertising and promotion which the Post Office does not pay.

Mr. OBERKOTTER. We think there is a distinction between a cost that is not incurred at all, as a result of which it does not have to be paid, and, on the other



hand, between the type of service that is rendered *but from which the Government agency is exempted*. . . .

*Id.* at 568 (emphasis added).

- C. *The postal system was authorized to "sue and be sued" in its official name in order to give it capacity to operate independently, in its own name, rather than, as formerly, in the name of the United States, as a subordinate and constituent part of the United States government for all purposes.*

In the statutory context in which it appears, the "sue and be sued" clause of the *Postal Reorganization Act* had two purposes. Neither entailed a general waiver of the historically settled immunity of the national postal system from state regulation.

One purpose of giving the postal system authority to sue and be sued in its official name, rather than in the name of the United States, was to give the system a separate legal identity and thereby emphasize its intended legal operating independence from other components of the United States Government. ". . . [T]he Postal Service would be insulated from direct control by the President, the Bureau of the Budget, and the Congress." H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 52 (1970)<sup>9</sup>. Postal "expenditures cannot be disallowed by the Comptroller General." *Id.* at 40. *Accord, Leonard v. Postal Service*, 489 F.2d 814 (1st Cir. 1974) (United States, appellant; United States Postal Service, appellee; showing independence of postal system from certain controls by Justice Department). Lack of a separate legal identity might have implied general retention of internal U.S. Government controls, and that would

<sup>9</sup>The quotation in the report is from the 1970 presidential message on postal reform appended to the report. The report states that the purpose of the bill is generally "to carry out the legislative recommendation of the President . . ." H.R. Rep. No. 91-1104, *supra* at 1.

have been contrary to the general legislative intent. 39 U.S.C. 410(a); 116 Cong. Rec. 21709 (1970).

A second purpose for giving the new Postal Service power to sue and be sued "in its official name", 39 U.S.C. 401(1), was to give the reorganized postal system the status of a separate entity within the United States Government for the limited purpose of inducing business-like financial management. The reorganized Postal Service, unlike the Post Office Department, was made responsible for generally conducting its operations without incurring a deficit. 39 U.S.C. 3621 (3d sentence). To that end, it was endowed with the general powers to set its own postal rates, 39 U.S.C. 3621; to control its own costs, 39 U.S.C. 401(3) and 2008(c); and to raise capital for modernization from private money markets, generally by borrowing on its own decision and in its own name without the full faith and credit of the United States. 39 U.S.C. §§2005, 2006.<sup>10</sup> At the establishment of the Postal Service, capital assets were transferred from the United States to the Postal Service to hold and use in its own name, 39 U.S.C. 2002.

The purpose of endowing the Postal Service with its own separate legal identity was to enable it, when it borrowed from private lenders, to obtain not only the money it needed, but also "financial discipline" — *i.e.* lender advice and insistence on fiscally sound "breakeven" operations. To give the Postal Service the authority to borrow, but not a separate legal identity, would have given it the funds it needed but not the discipline. Absent such discipline, lenders would lend based on the fiscal soundness of the United States Government, which would be liable for the postal system's debts, without regard to whether the Government's postal system in particular was

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<sup>10</sup>There is a provision authorizing a U.S. guarantee, but only upon Postal Service request, and the discretionary approval of the Secretary of the Treasury. 39 U.S.C. 2006(c).



operating at a deficit, borrowing to meet operating expenses, making unwise investments, or being poorly managed.<sup>11</sup>

The only statutory exceptions from the general authority of the postal system to operate in its own name are that: in exercising its power of eminent domain, the postal system is required to act in the name of the United States, 39 U.S.C. 401(9); and tort claims against it may be brought against the United States, 39 U.S.C. 409(c); 28 U.S.C. 2674, 2679(a); *see*, 31 U.S.C. 724a (last sentence).

**D. *To construe the Postal Reorganization Act's "sue and be sued" clause as waiving the postal system's historic sovereign immunity from State power would be inconsistent with the fundamental purposes of the act.***

The position that the PRA intended the postal system to be subject to State wage garnishment process apparently rests upon an erroneous inference from the legislative history showing that Congress wanted the postal system to operate in a more "business-like" manner. The conclusion is that, since private businesses are subject to State wage garnishment process, the postal system would be more "business-like" if it too were

<sup>11</sup>"The best possible checks against an unwise use of the borrowing power are those of the financial market — no provision of law could be nearly as effective. If, for example, the Postal Service were to propose to raise funds for operating expenses resulting from inadequate use of mail handling machinery without taking prudent steps to remedy the inadequacy, the market would reject the offering or place upon them an unaccessibly high rate of interest. The same discipline may be expected to exert its influence on the extent to which the \$10 billion borrowing authority is actually used." H.R. Rep. No. 91-1104, 91st Cong. 2d Sess. 20 (1970). "The Committee is confident that those who assume the management of the Post Office will recognize the difficulties the Post Office will encounter in attempting to borrow money if its financial structure is not sound and its spending practices are not proven." S. Rep. No. 91-912, 91st Cong., 2d Sess. 9 (1970).

subject to State wage garnishment process. See, eg. *Standard Oil, supra*, at 202 (2d column), 203 (2d column); *May Department Stores, supra* at 1148.

The basic fallacy of this conclusion is that it overlooks the public purpose for which business methods were sought for postal operations.<sup>12</sup> The intent was not to indiscriminately copy all aspects of private business organization, but rather to selectively adopt those "modern management and business practices that must be available if the American public is to enjoy efficient and economical postal service . . ." H.R. Rep. No. 91-1104, 91st Cong. 2d Sess.2 (1970).

Wage garnishment would not make the postal system operate more economically and efficiently. On the contrary, by embroiling the heavily-burdened system in third-party litigation from which the postal system had theretofore been exempt, wage garnishment would add a new and costly burden to the postal system's responsibilities. If wage garnishment is permitted, the costs of postal operations will either increase, or funds used to provide postal service to the public will have to be diverted to debt collecting. The costs of garnishment-mandated debt collecting will, under the PRA, ultimately be passed on to the general public, who, just like the District of Columbia taxpayers in *Chewning, supra*, 119 F.2d at 460, are innocent parties so far as the dispute between postal employees and their creditors are concerned. It is reasonable to anticipate that the fundamental purpose of providing good postal service at reasonable cost would be frustrated, not only by State wage garnishment, but also by State liens, by State attachments, by State-authorized interceptions of mail in transit under pur-

<sup>12</sup>In a context not concerning garnishments, the Second Circuit has recognized the congressional intent that the Postal Service is a service to the American people and not a business enterprise. *Chelsea Neighborhood Assns. v. U.S. Postal Service*, 516 F.2d 378 (2nd Cir. 1975). (Appropriate congressional history is quoted in footnote 16 p. 389).



ported authority of State search warrants, by State and local taxes on postal property, postal "sales", and postal "income", and by State regulations and local ordinances purporting to override the Federal postal laws and regulations. This concept must be stopped.

#### POINT IV

**Congress continues to consider the Postal Service to be a Federal instrumentality generally immune from State power.**

Two years ago Congress enacted an express waiver of the United States government's sovereign immunity from State law wage garnishments for alimony and child support. Section 459 of the Social Security Act, as amended, 42 U.S.C. 659 (Supp. V., 1975). The legislative history expressly states that the provision is intended to apply to the "United States Postal Service." Senate Finance Committee Print, "Child Support Data and Materials," 94th Cong., 1st Sess. 139 (1975). If Congress had, by enacting 39 U.S.C. 401(1) in 1970, waived the sovereign immunity of the Federal postal system, effective July 1, 1971, Congress obviously would not have taken the unnecessary action of waiving it again, in a more limited fashion, in 1975.

An amendment of the Social Security Act just enacted makes Section 459 explicitly apply to the United States Postal Service: "For purposes of Section 459 . . . The term 'United States' means the Federal Government of the United States . . . including the United States Postal Service . . ." Sec. 462(a) of the Social Security Act, as amended, Pub. L. No. 95-30, Sec. 501(d), May 23, 1977, 91 Stat. 159-162.

Since 1975, the United States Postal Service has honored alimony and child support garnishment orders against the wages of postal employees issued under State law, based on the

authority of the 1975 Federal act. If Congress considered the appellate interpretations of 39 U.S.C. 401(1) in 1975 and 1976 in the *Starks* and *May* cases to be correct, it would not have considered the 1977 amendment to be necessary.

In addition to this Social Security legislation, consideration should also be given to Section 717 of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972. Pub. L. 92-261, March 24, 1972, Sec. 11, 86 Stat. 111, 42 U.S.C. § 2000(e)-16 (Supp. V, 1975). The Second Circuit has held that this amendment constitutes the government's consent to all action which would otherwise have been barred by the doctrine of sovereign immunity. *Brown v. G.S.A.*, 507 F.2d 1300, 1307 (2nd Cir. 1974), aff'd 425 U.S. 820, 826 (1976). Since Congress expressly made Section 717 applicable to the U.S.P.S., 42 U.S.C. 2000 e-16 (a), it would seem clear that Congress was fully aware that the PRA enacted one year earlier retained sovereign immunity for the U.S.P.S. and needed this express waiver to effect the purpose of the Civil Rights Act. Obviously, if the PRA waived sovereign immunity, there would be no need to include this express waiver.



## POINT V

The doctrine of collateral estoppel is not applicable to this case. Furthermore, since the issue was not raised in the District Court, the Appellant should be precluded from raising it on appeal.

The government is not unmindful of the caseload of this and other circuits and the ever-increasing demands on judicial time and energy. In addition, the government is not insensitive to the criticism of the Eighth and Third Circuits relative to this issue. However, the issue presented in this litigation raises the significant question of sovereign immunity for the U.S.P.S. In this regard, the reconsideration of this issue has been of substantial benefit to the U.S.P.S. in developing the legal position it presents on this appeal. This position was not presented in total to, or considered by, any other circuit hearing the issue. Furthermore, it is significant that the U.S.P.S. is defending this appeal, rather than appealing an adverse decision.

The Second Circuit, while respectful of the decisions of other circuits, has expressed its attitude that it is not bound by similar decisions in other circuits. In *Haberle Crystal Springs Brewing Co. v. Clark*, 30 F.2d 219 (2d Cir. 1929 Judges Marston, Learned Hand and Swan) rev'd on other grounds, 280 U.S. 384 (1930) the Circuit said:

"Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, where our minds are not persuaded by the agreements advanced." 30 F 2d at 219.

In order to rebut the appellant's argument it is important to examine the doctrine of collateral estoppel:

A. *Collateral estoppel relates only to issues of fact or mixed issues of fact and law and not to issues of law alone.*

The doctrine of collateral estoppel provides that "when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). The doctrine, however, "makes conclusive in subsequent proceedings only determinations of fact and mixed fact and law." *Yates v. United States*, 354 U.S. 298, 336 (1957), citing *Commissioner v. Sunnen*, 333 U.S. 591 (1948). *Accord: United States v. Granello*, 365 F. 2d 990, 993 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); *Pan American World Airways, Inc. v. C.A.B.*, 380 F. 2d 770, 776 (2d Cir. 1967), *aff'd by an equally divided court*, 391 U.S. 461 (1968).

In this case the only questions presented by the appellant are legal questions.

In *Sunnen*, *supra*, the parties to the first and second cases were the same, and the legal issue in both cases was the same; but the facts of the cases were "separable". The Court held that the doctrine of collateral estoppel did not apply, saying:

If the very same facts and no others are involved in the second case . . . the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue." 333 U.S. at 601.

*Accord: F.T.C. v. Texaco, Inc.*, 555 F. 2d 862, 880 (D.C. Cir. 1977) ("a collateral estoppel defense rests on *factual identities*") (*emphasis in original*); *United States v. Wise*, 550 F. 2d 1180



(9th Cir. 1977); *Pan American World Airways v. C.A.B.*, *supra*.

In this case, one party to this suit (U.S.P.S.) was also a party in earlier suits where the same purely legal issue was presented: whether Congress has waived the sovereign immunity of the Postal Service. The underlying facts, however, though they are similar to the facts of the earlier cases, are not the same facts as were involved in the earlier cases. There is a different postal employee; a different judgment against the employee; a different debt of earned wages owed to the employee. Under the teachings of the Supreme Court discussed above, these differences are critical to the application of the doctrine of collateral estoppel and require that the doctrine not be invoked here.

*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Zdanok v. Glidden Co.*, 327 F. 2d 944 (2d Cir. 1967), do not in any way detract from the distinction between questions of fact (including mixed questions of fact and law like certain patent cases), and questions of law, which the Supreme Court has so carefully drawn. Neither case, while both considered whether mutuality was necessary to invoke collateral estoppel, involved an issue of law.

In *Blonder-Tongue*, the issue which the Court held determined by collateral estoppel was the validity of a patent, a mixed question of fact and law. As the Second Circuit has recognized, "judicial conflicts in the patent area typically concern the application of undisputed principles of law to a complicated array of facts and do not reflect differences over what the governing principles of law mean." *Divine v. Commissioner of Internal Revenue*, 500 F. 2d 1041, 1049 (2d Cir. 1974). In this case, the facts are undisputed: they merely provide the basis for the dispute over the correct interpretation of the law.

The dispute in *Zdanok* was an interpretation of a collective bargaining agreement requiring a determination of mixed questions of fact and law, questions of what the parties to the contract had agreed.

The inapplicability of the doctrine of collateral estoppel to pure questions of law is further supported by *Divine v. Commissioner*, 500 F.2d 1041 (2d Cir. 1974). In that case, the question was whether the Second Circuit should apply the doctrine of collateral estoppel to preclude relitigation of a tax issue already decided by the Seventh Circuit, where the only differences between the case before the Second Circuit and the earlier decision of the Seventh Circuit were the name of the taxpayer and, presumably, the amount of money on which the tax was to be assessed. The court held that the doctrine of collateral estoppel did not apply, notwithstanding that the facts in both cases were legally indistinguishable, and thus permitted the relitigation of the legal question.

In *Divine*, the court discussed several factors which it believed should be considered in determining whether to invoke the doctrine of collateral estoppel. The first factor was whether the issues presented in the cases were "subject to varying appraisal" by different adjudicatory bodies. The court stated that the interpretation of a collective bargaining agreement in *Zdanok* would be determined the same way regardless of the forum, but that the tax issue in *Divine* was subject to "varying appraisals."

Although this distinction seems tenuous, the sovereign immunity issue here is evidently one which is subject to "varying appraisals", since such varying appraisals have indeed been made, as evidenced by the Federal District Courts in New York, California, the District of Columbia, West Virginia, Virginia, and Ohio which do not agree with the appellant's position. In this respect, the court's discussion of the Texas Gulf



Sulphur litigation, 500 F.2d at 1047-48, seems applicable to the situation presented here.

The second factor considered by the court in *Divine* was the burden which multiple litigation would impose on the parties, the courts, and society generally. The court said that patent relitigation, such as that involved in *Blonder-Tongue, supra*, required an inordinate amount of judicial time, was prohibitively expensive for the parties, especially the defendants, and produced anticompetitive effects in the market place. It further found, however, that these adverse effects were "peculiar to patent validity relitigation," 500 F.2d at 1048, and that there were no countervailing reasons for permitting relitigation of patents. The court said, moreover, that in the tax litigation involved in the case before it, there were significant reasons for permitting relitigation, primarily the desirability of uniformity in the law, the importance of uniform tax laws to the public at large, and the difference in the nature of issues between tax litigation, often involving "pure issues of law," and patent litigation, often involving factual disputes. 500 F.2d at 1048-49. Similar considerations are present here.

The law regarding the sovereign immunity of the Postal Service is not uniform, and only the authoritative resolution of the continuing litigation can bring uniformity. The public at large has an interest in the sovereign immunity of the Postal Service because the public uses the mails, pays postage, and will have to bear the costs of complying with postal wage garnishments which are not specifically authorized by Congress. There is, in addition, a danger to the transmission of the mails if property in the possession of the Postal Service is held to be subject to attachment and seizure under third-party civil process. Moreover, sovereign immunity litigation, like the tax litigation in *Divine*, involves "pure issues of law," not complicated fact issues. Appellant's statement of the relevant facts fills less than one page.

In *Divine*, The Second Circuit additionally considered the effect of the Supreme Court's policies regarding review by certiorari of Court of Appeals decisions and the relationship of those policies to government litigation. It said that only the Supreme Court can resolve many issues, because the government often considers itself, as here, not bound by a Court of Appeals decision with which it disagrees in its activities outside that circuit. The uncertainty which this engenders, the court noted, is substantially affected because the Supreme Court does not "habitually" review Court of Appeals decisions, but instead withholds its views until a conflict between circuits has developed. While this uncertainty is not desirable, the court said that the alternative — precluding litigation which might result in the conflict necessary to induce Supreme Court review — is even less desirable, because inquiry into the merits of the legal dispute by other circuits would be foreclosed. 500 F.2d at 1049-50.

Finally, the Second Circuit said that the doctrine of collateral estoppel was developed to protect a person from "legal harassment and redundant legal fees." 500 F.2d at 1050. The court reasoned that the taxpayer in *Divine* needed protection from neither. The garnishment creditor in this case has not shown a need for protection from repetitious litigation. It has not been forced to incur legal expenses which merely duplicated expenses it had already incurred in litigating elsewhere the same issues of fact or law.

**B. *The issue of collateral estoppel was not raised in the District Court and therefore can not be raised on appeal.***

The issue of collateral estoppel was not raised in the District Court. Since collateral estoppel is the type of pleading (affirmative defense) required to be set forth affirmatively. Fed. R. Civ. P. 8(c). *Blonder-Tongue, supra* at 350, the failure to plead collateral estoppel should be taken as a waiver of the issue. See



generally, C. Wright & A. Miller, *Federal Practice and Procedure* §1278 (1969).

Moreover, matters not raised in the District Court generally will not be considered by an appellate court. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Wilkerson v. Meskill*, 501 F.2d 297 (2d Cir. 1974); *Terkildsen v. Waters*, 481 F.2d 201, 204 (1973). The reason for this rule, the application of which appears appropriate here, was stated by the Second Circuit in *Terkildsen*, as follows:

Adherence to the rule is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court.

To determine whether collateral estoppel may properly be invoked, it is essential that the trial court determine that the fact issues which would be foreclosed from litigation in the case before it be the same facts as those in the earlier case. No such determination has been made by the trial court in this case. In order to make such a determination, moreover, the Court of Appeals would have to remand the case to the District Court. Since the purpose of the collateral estoppel doctrine is to avoid unnecessary trials, a remand to determine whether collateral estoppel precludes this litigation would appear to be self-defeating.

Judicial economy would be better served in this case if the Court of Appeals decided this case on the merits, rather than delaying a final determination by remanding it to the District Court for a trial to determine whether the doctrine of collateral estoppel might be properly invoked.

**CONCLUSION**

The United States Postal Service is an independent establishment of the executive branch of the Government of the United States and continues to enjoy immunity from wage-garnishment proceedings.

**RICHARD J. ARCARA**  
United States Attorney

By: **GERALD J. HOULIHAN**  
Assistant United States Attorney



# Affidavit of Service

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## The Daily Record

January 16, 1978

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Beneficial Finance Co. vs. Dallas

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City of Rochester )  
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Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

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Gerald Houlihan, Asst. U.S. Attorney  
Of Counsel  
Attorney(s) for  
Appellee

On January 16, 1978

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix  
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